No. 2817

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

E. SCHOENWALD and S. T. HILLS as Receiver and Assignees of the Pacific Coast & Norway Packing Company, a corporation,

Plaintiffs in Error,

vs.

HARRY A. BISHOP, as United States Marshal for the first division of the district of Alaska, and D. N. McDONALD,

Defendants in Error.

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT OF THE DISTRICT OF ALASKA, DIVISION NO. 1.

Brief of Plaintiffs in Error

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STATEMENT OF CASE.

In this case there is no essential issue of fact. When the plaintiffs presented their evidence defendants announced they would offer none, they deeming that only questions of law were involved. (Rec. p. 176.)

Pacific Coast & Norway Packing Company is a Minnesota corporation actually operating in Washington and Alaska. Its business affairs practically all centered at Seattle. In September, 1914, the company faced a financial crisis. Its bank account and much of its salmon pack were tied up by garnishments. Rumors had spread that part of its pack had spoiled, and a number of suits threatened. Although the company's assets were valued largely in excess of its liabilities, it was unable to meet its current obligations. The officers and directors and principal creditors and stockholders concurred in desiring to secure all the creditors equally and conserve the assets, and it was decided that a receivership would best serve the purpose (rec. p. 66). A friendly suit was accordingly arranged (p. 83), and a complaint by a creditor asking that a receiver be appointed and an answer by the company virtually admitting the petition were prepared. Both were filed at the same time—September 16, 1914. (Rec. pp. 177, 179.) Immediately an order was entered appointing the receiver, both parties attending for this purpose. Although the proceeding was in strict form adversary, in fact the company voluntarily adopted this means of turning over its assets to its creditors (pp. 66, 83). This fact is of far reaching importance.

Subsequently an advisory receiver was appointed and likewise immediately qualified (p. 186). Immediately upon appointment the receiver took

possession of all the company's assets both in Washington and Alaska, and assumed control of all its business, the company voluntarily turning over the assets in Alaska to the end that the receivers should have full control to do the best for all the creditors (pp. 67, 93, 152). Although the receivers thus had actual possession and control of the Alaska assets, yet legally the receivership of course extended only to the limits of Washington —either the receivership must be extended over Alaska by ancillary proceedings or a common law transfer of the Alaska assets be made for the benefit of the creditors. Proceedings were begun in the Alaska court to extend the receivership, but it was subsequently decided to transfer the assets instead for the creditors. The directors and stockholders favored this and stood ready to make the necessary instruments of transfer. It was obviously in order to make the Washington receivers trustees of the Alaska assets also, and to obtain first the approval of the Washington court to its receivers taking title to the Alaska assets and undertaking their distribution. Therefore, after the plan had been fully worked out by the company and the receivers, and while the deed and bill of sale were being prepared, the active receiver Mr. Schoenwald together with the president of the company went before the Washington court and obtained an order in the premises. Although in form this directs the company to make the conveyance and the transfer, it was only an approval of what had already been agreed upon and

was in process of execution (rec. p. 76, ans. to cross-int. 9). The court signed the order only when assured by the president that the company desired the transfer of the Alaska assets to the receivers. (Rec. pp. 69, 70, 84, 94-96, 98, 154). As a matter of fact, therefore, the company did not make the transfer because of the order, but the order was simply by way of approval of its receivers' part in what the company was then doing entirely of its own motion (rec. pp. 75, 76, 84, 87, 95, 155). The transfer was not made under or with reference to any statute of the state of Washington (rec. pp. 73, 99).

The receivers thus took title October 26, 1914. In January, 1915, the defendant McDonald, one of the few Alaska creditors of the company, began an action against it on two promissory notes and attached the gasoline boat "Bernice" as the property of the company. This boat had been expressly included in the transfer to Schoenwald and Hills, the receivers, and this action in replevin was instituted by Schoenwald and Hills accordingly. Trial was begun before a jury but the parties afterwards stipulated that the jury might be discharged and decision be rendered by the court alone (rec. p. 176). The court took the case under advisement and later filed a written opinion directing judgment for the defendant (rec. pp. 226, 254); findings, conclusions and judgment were entered accordingly, and plaintiffs sued out this writ of error.

The question therefore is whether the transfer of the "Bernice" to Schoenwald and Hills is good as against the attaching creditor McDonald, and this at bottom, we submit, depends upon whether the transfer was a voluntary common law assignment or was an involuntary or statutory assignment. If the former, as we contend, then it is good everywhere, and the judgment of the lower court should be reversed.

ERRORS RELIED ON.

1. The court erred in refusing to make finding of fact No. II offered by plaintiffs in error, which reads as follows:

> "That the appointment of said plaintiffs, Schoenwald and Hills as receivers of said Pacific Coast & Norway Packing Company was voluntary on the part of said Pacific Coast & Norway Packing Company and at the suggestion and with the acquiescence, assistance and consent of said company and was done solely for the purpose of preserving and keeping intact the property and assets of said company and preventing forced sales thereof by reason of certain suits which had been brought, or were being threatened, and such appointment of said receivers was in order to secure equality among the creditors of the company; that at the time of the appointment of said plaintiffs as receivers, as aforesaid, the assets of said Pacific Coast & Norway Packing Company exceeded the liabilities, but such assets could not at said time be realized upon, and in order to protect and preserve the same it was deemed wise to have such receivers appointed to protect all the creditors alike, as aforesaid."

2. The court erred in refusing to make proposed finding of fact No. III, as follows:

> "That on, towit, the 26th day of October, 1914, the said Pacific Coast & Norway Packing Company to further protect all the creditors alike and avoid the expense and occasion of appointing ancillary receivers in Alaska, and for the sake of efficient, economic and unified administration of the assets of said Pacific Coast & Norway Packing Company, to the benefit of all the creditors alike, voluntarily and of its own free will and accord, conveyed all of its property, both real and personal, to the said E. Schoenwald and S. T. Hills in trust for the benefit of all creditors of said corporation; the real estate being conveyed by deed and the personal property, including the gasoline boat, "Bernice," by bill of sale, and the said Schoenwald and Hills immediately thereafter took possession of all of such personal property, including the said gasoline boat, "Bernice."

3. The court erroneously refused to make proposed finding of fact No. VI, which reads as follows:

> "That every trustee or director and all the stockholders of the Pacific Coast & Norway Packing Company desired, approved and ratified giving the said conveyance to said Schoenwald and Hills as trustees aforesaid, conveying the title to the Alaska assets, and approved the execution of the instruments transferring such assets to said E. Schoenwald and S. T. Hills as trustees; that this approval was not by a formal meeting of the stockholders, but was obtained by Mr. Schoenwald, one of the receivers, communicating with the great majority of the stockholders, and personally conferring with the rest of them; that the consent and approval of all

the directors, as well as all of the stockholders, to the execution of the instruments transferring the legal title of the Alaska assets to the receivers was obtained in the manner aforesaid."

4. The court erred in not making proposed finding of fact No. VIII as follows:

> "That the transfer of the assets by said Pacific Coast & Norway Packing Company to E. Schoenwald and S. T. Hills was not made under and by virtue of any Washington statute, or any statute, or by compulsion of law, but the instruments were prepared and executed voluntarily by said company with a view of passing legal title to the said trustees in accordance with the principles of common law, and for the benefit of all the creditors of said corporation alike."

5. The court erroneously refused to make requested conclusions of law numbered I, II, III, IV, and V (rec. pp. 209-211), which in substance were that the transfer of assets to the plaintiffs was a common law assignment, freely executed and consented to by all the directors and stockholders of the company; that the transfer was not under any statute or under compulsion of law, and constituted plaintiffs owners of the assets, which therefore were not subject to subsequent attachment as the company's property.

6. The court erred in making finding of fact No. VII, and especially that portion thereof referring to the bill of sale which reads as follows: "Said instrument in fact was executed 'pursuant to the

order of the superior court of the state of Washington in and for King County'."

7. The court erred in making finding of fact No. VIII reading as follows:

> "That said corporation has not by any action of its governing board transferred or assigned said property to said Schoenwald and Hills, in any capacity or at all, nor at all ratified nor acquiesced in any such assignment, or in said receivership proceedings."

8. The court erred in making conclusions of law numbered I and II, which are substantially that the assignment to the plaintiffs of the Alaska assets was *in ivitum* and had no extraterritorial effect, and that the possession by the defendants was therefore rightful and the attached property should be returned to them.

9. The court erred in rendering judgment for the defendants.

We think the court erred also in the exclusion of testimony (see assignment of errors, rec. pp. 33-46) but since there is ample evidence before the court to sustain our contention we waive the further errors assigned on these points.

ARGUMENT.

Upon final analysis we contend that the court in its decision fell into three fundamental errors, that is, it was error to hold

(1) that the transfer was not shown to be the act of the company;

(2) that the transfer to the plaintiffs in error was involuntary; and

(3) that even if voluntary the assignment was yet invalid as against subsequent attachments by Alaska creditors. Our contention on the contrary is that the Pacific Coast & Norway Packing Company in fact made a voluntary assignment of its Alaska assets to the plaintiffs in error for the equal benefit of all creditors, and that that assignment carried title against Alaska creditors as well as others.

I.

The transfer was the act of the company.

The district court held that the transfer was not shown to be the company's act. Says the opinion:

> "No resolution of the board of directors authorizing the assignment is shown—nothing to show that it has ever been even discussed at any meeting, or that any meeting of the board was ever held for that purpose, nor that its making has ever been ratified. Only this appears, that the president and some of the directors and the attorneys have informally and individually agreed that the assignment ought to be made—that this would not be sufficient to validate an assignment is well borne out by the authorities." (Rec. p. 231.)

The last sentence quoted is the one and only reference in the entire opinion of 30 printed pages to

the convincing testimony of four witnesses—Schoenwald, receiver, Steberg, president of the company, and Kells and Smith, attorneys, all speaking from knowledge and bearing out that the directors, stockholders and the leading creditors all favored the transfer of the Alaska assets, and that afterwards literally all of the stockholders and directors acquiesced in and expressly approved this transfer (rec. pp. 69-70, 84, 96). For example, Mr. Schoenwald himself talked with all the directors, and all the stockholders either in person or (in the case of a few small stockholders) through their authorized representatives (rec. p. 154).

This, we submit, especially well brings home the fundamental weakness of the decision. It rests upon narrow, technical application of rules of law, which really do not fit the actual situation at all. The court overlooked all of this testimony in the case, disregarded the recital that the transfer was voluntary and saw nothing but a few recitals here and there in the written instruments, which taken alone are inaccurate.

Proceeding now to the point that the transfer of the Alaska assets is the act of the company. The deed and bill of sale were both executed in the name of the company by its president under the company seal. They would at most be merely voidable by the company, and nobody ever thought of setting them aside. Instead, as stated, the directors and stockholders have all consented and acquiesced, and

this cured any irregularity in the corporate procedure. A further answer to the court's position is that a creditor has no concern with the management of the corporation's internal affairs, and therefore cannot raise the question whether its procedure is regular or irregular. Of course fraud might vitiate whether the transfer is regular or irregular, but no question of fraud arises here. On the contrary all the evidence makes clear that the purpose of the transfer was to assure fairness and equality to all the creditors.

The authorities establishing these propositions in our favor are numerous and well considered. The transfer here was made in the state of Washington where the company's business centered, and the supreme court of that state has decided this very question in our favor on the grounds both of acquiescence and that a creditor is concluded. We refer to the case of *Roy & Co. v. Scott, Hartley & Co.,* 11 Wash. 399. On the point of acquiescence the court says:

> "While it may be true as a proposition of law that a minority of the stockholders may attack and rescind a contract made without authority of the corporation * * * acquiescence in such contract estops."

There, as here, the stockholders all acquiesced. As to the point of the creditor not being in position to object, the court says:

> "Assuming that the transaction was one that could be repudiated without any showing of

> fraud or injury, it would still be voidable merely, and not void, and the right to avoid it would belong only to persons who had an interest in the property before the transfer, and no other person has the right to question it or set the sale aside," citing authorities (p. 404.)

In the case at bar the defendant McDonald has only his attachment lien, and that was acquired months after the transfer of title to the plaintiffs.

In the case of *Marsters v. Oil Co.,* 90 Pac. (Ore.) 151, a mortgage foreclosure, a creditor claimed the mortgage invalid because not authorized at a duly held meeting of directors. Said the court referring to irregularities in the execution of instruments:

> "Such transactions however * * * are only voidable at the instance of the corporation or its stockholders. The corporation or its stockholders may, like an individual, elect to confirm a transaction which could have been repudiated * * * and if the transaction is acquiesced in by the corporation and its stockholders it becomes as valid and binding as if regularly authorized. A creditor does not, in this respect, stand in the position of the corporation or a stockholder, and he is not entitled to exercise the rights of either * * * His right to question a transaction of this character, which has not been repudiated or disaffirmed by the corporation or a stockholder, depends upon its fraudulent character, and not whether it was regularly authorized in the first instance. If it was in fact fair and honest and not intended to hinder, delay, or defraud creditors, it cannot be attacked by him," citing leading authorities (p. 153).

Morisette v. Howard, 63 Pac. (Kans.) 756, is essentially like the case at bar in its facts. There attaching creditors showed that there had been no meeting of the directors authorizing the sale. Said the court—p. 757:

> "There was an individual assent of the directors reported to be present at a meeting, and there was also the acquiescence and assent of the stockholders or those representing them. The act which they undertook to perform was within the power of the corporation. It was informally done, but the informality was cured by the ratification of the stockholders."

So the facts in *Miller v. Matthews,* 40 Atl. (Md.) 176, are essentially like ours. The corporation there made an assignment for the benefit of creditors which had been authorized by only two of its five directors. The other directors and the stockholders however acquiesced later, just as here. On page 178 the court marshals numerous authorities holding that this is full validation. The court follows *Stokes v. Detrick,* 23 Atl. (Md.) 848, in approving *Kelsey v. Bank,* 69 Pa. St. 429, where it is said:

> "The law is well settled that a principal who neglects promptly to disavow the act of his agent, by which the latter has transcended his authority, makes the act his own; and the maxim which makes ratification the equivalent of a precedent authority is as predicable of ratification by a corporation as it is of a ratification by any other principal, and is equally to be presumed from the absence of dissent."

Citing Mor. Priv. Corp., §618, and cases.

Bank v. Duncan, 35 So. (Miss.) 569. There creditors attack an assignment for the benefit of creditors on the ground that legal notice was not given of the stockholders' and directors' meetings authorizing the assignment. The court held that there being no claim of fraud on the creditors, the stockholders alone were concerned with these irregularities, and insomuch as the stockholders approved, the creditors could have no relief. Numerous authorities are cited, including special reference to Judge Cooley's opinion in *Beecher v. Marquette,* 7 N. W. (Mich.) 695.

In the case of *El Cajon v. Wentz Co.,* 165 Fed. 619—C. C. A. 6th Cir.—a corporation in embarrassed circumstances conveyed most of its real property to one of its officers in discharge of an individual debt to him, and a general creditor sought to set aside the conveyance on the ground that the meeting at which it was authorized was irregular. Despite the appealing equities of the case, the court said:

> "That action of the board has not been attacked by the corporation or its stockholders but has been acquiesced in and the conveyance upheld by the answer of the corporation herein. Under such circumstances it is not open to a creditor to question the conveyance if in fact it was made in good faith." (p. 621.)

In *Swentzel v. Franklin Investment Co.,* 67 S. W. (Mo.) 596, the court held (598) that in the absence of fraud

"it is a matter of no concern to a creditor of a corporation whether a deed to the corporation's property be ordered made by the individual directors, or whether it has been done by an order of the directors as a body at a board meeting, upon resolution duly spread upon the records of the corporation."

The case of *Jordan v. Collins,* 18 So. (Ala.) 137, is much in point. There the contest was between a prior purchaser and a subsequent attaching creditor. It was claimed that the president was without corporate authority to make the sale. The stockholders approved the sale. The court held this was sufficient.

The reasons of the law are extremely well expressed in *Gordon v. Preston,* 1 Watts (Pa.) 385; 26 A. D. 75. There a mortgage had been ordered at a meeting of the directors of which a number of the absentees had been given no notice whatever. The court recognized that the effect of the matter was to enable a third of the directors to act perhaps in fact in opposition to the will of the rest. Nevertheless, the court held that since the validity of the mortgage was unquestioned by the corporation, although known to it all along, no one else has a right to object. "None but the parties to the act of delegation were competent to allege the existence of a defect in the authority."

Another case in point clearly setting forth the reason of the law is *Ashley Wire Co. v. Illinois Steel Co.,* 45 N. E. (Ill.) 410. That was a mortgage

foreclosure in which the corporation, receivers and various creditors were defendants. The objection was that the mortgage was not authorized at a legal meeting of the directors. The court said (p. 412):

> "The act sought to be impeached was within the general powers of the board of directors, and it has never been disavowed by the corporation * * * Those affected by the act unquestionably may, and apparently do prefer to ratify it as just and proper, even if irregularly done, and of course if that is the case the other defendants have no right to interfere."

To the same effect are

Company v. Wood, 119 Fed. 966, top p. 968, and end of opinion (affirmed 125 Fed. 337);

Stiewell v. Company, 94 S. W. (Ark.) 915;

Company v. Miller, et al, 151 N. W. 813;

Railway Co. v. Shailer, 141 Fed. 585 (C. C. A. 5th Cir.);

Hubbard v. Camperdown Mills, 2 S. E. (S. C.) 576;

Johnson Co. v. Miller, 34 Atl. (Pa.) 316;

3 *Clark & Marshall Priv. Corp.* 2076, 2090, 2348.

Reverting to the opinion of the lower court in the case at bar, the court's own reliance of *Company v. Haskell,* 144 Mo. 331, recognizes our law as to ratification by acquiescence, in saying:

> "When such an assignment has not been validated by acquiescence or laches, it may obviously be impeached * * *" (Rec. p. 233.)

As to the other point that it does not lie in the mouth of a creditor to question the regularity of the assignment in the absence of fraud, the court had no answer whatever. No authority to meet this was adduced.

We submit that alike under reason and authority on both grounds which we have discussed, the assignment of the Alaska assets stands as the act of the assignor corporation.

II.

The transfer was voluntary.

The district court's decision that the transfer was involuntary was based solely upon two cases involving identically the same set of facts, by the federal circuit court and the state court in Kentucky. The cases are *Zacher v. Fidelity & Safety Vault Co.,* 59 S. W. 493, and *Huntington v. Railway Co.,* 98 Fed. 459 (see rec. pp. 236-9). The facts as set forth in the state court opinion show that previously to the appointment of a receiver for the company in Connecticut, it had turned over nearly a million and a half dollars to one favored creditor who was a stockholder of the company, which left its treasury empty, and that it had turned over practically all of its other property to officers of the company to protect them against loss upon certain obligations which they had signed as security for the company; so that in fact when the transfer was made to the receiver in Connecticut there was practi-

cally nothing for him to receive and distribute amongst the other creditors, including those in the state of Kentucky. It was contended that the whole proceeding in Connecticut was a scheme to prefer certain creditors to the prejudice of all others, and the court upon reviewing the testimony held that it disclosed "the most extraordinary disregard of the rights of the creditors of this corporation living in the state of Kentucky." It held there was in fact no voluntary or common law assignment for the benefit of all the creditors equally, made or authorized by the corporation, and especially remarked that the judgment in the receivership matter "did not purport to be a consent judgment." (See pages 494, col. 1 and 495, col. 2).

The facts in the instant case certainly are not to be compared with those in the Kentucky case. Here there has been no transfer to favored creditors of all the company's assets. On the contrary the company and all interested parties have sought to secure an equal distribution of all its assets among all its creditors, regardless of citizenship and residence. The defendant in error who by his attachment seeks to be preferred above all the other creditors is the only exception. In the case at bar the order entered just previously to the transfer of the Alaska assets *does expressly on its face purport to be entered upon the consent of the company.*

No special consideration need be given to the case in the federal court which arose under the

same set of facts, there simply being another fund involved. There it was decided too that no independent assignment for the benefit of creditors was ever intended, but merely one worked out through the operation of a judgment of the court under the statutes of the state of Connecticut (pp. 462, 464). The court decided that since all the proceedings in the receivership matter were in form involuntary it would not go behind the form of the proceedings themselves to determine to what extent the company acquiesced in them, but this view evidently did not commend itself to the circuit court of appeals, whose review of the decision is reported in 106 Fed. 593. The appellate court considered itself bound by the state court's holding on identically the same set of facts, that the transfer was involuntary, but one is convinced with very little reading between the lines that the circuit court of appeals did not agree with the state court's decision and would have held the transfer voluntary had the question been open to it. It considered, however, that to disregard the state court's holding in a concern of "purely local policy of the state * * * would be a scandal upon the administration of justice."

The facts of the instant case contrast remarkably with those in the Kentucky case with respect to the features which seem decisive there. Here there is no scheme to prefer any creditor. Here all the assets have been put at the disposal of Mr. Schoenwald and Mr. Hills as trustees for the benefit of all

the creditors of the company equally. Here the receivership suit was a friendly proceeding planned and participated in by the company at its origin for the purpose of securing equality to all the creditors, and here the order relating to the transfer of the Alaska assets on its face is a consent order, and this fact alone eliminates the Kentucky case as an authority in point.

The facts in our case which we advert to now will show that there are two independent grounds upon which the transfer of the Alaska assets should be held to be a voluntary assignment.

First. The receivership itself was a voluntary proceeding, and hence even if the transfer had been a necessary incident of the receivership (which it was not), nevertheless as a part of a voluntary proceeding the transfer too would have been voluntary.

Second. As a matter of fact, the transfer of the Alaska assets was no part of the receivership proceeding in Washington, but an independent voluntary transaction.

We shall consider these two grounds in the order mentioned, in relation to the evidence. The testimony shows beyond question that the receivership was a voluntary proceeding. True it in form is adversary since it is begun by complaint and petition of a creditor (rec. p. 177). However the whole matter was pre-arranged with the company, which freely adopted this means of distributing its assets

to its creditors. The following is quoted from the testimony:

> "In order to secure equality among the creditors of the company and to preserve the assets it was deemed wise by the company's officers and directors and by the principal creditors and stockholders to have receivers appoint." (Dep. Kells, rec. p. 66.)

> The president of the company testified that "we wanted to protect the creditors and get the company in shape again, and so a friendly suit was started and receivers appointed." (Dep. C. O. Steberg, rec. p. 83.)

As further evidence that the suit was a prearranged friendly proceeding, note that the complaint, answer, order appointing the receiver, and receiver's bond and oath were all filed the same day (rec. pp. 177-185 inc.), and although the answer ends with a formal demand for the dismissal of the complaint, yet it does not deny a single substantial allegation of that pleading (rec. p. 180).

The company's funds and salmon pack were tied up by garnishments; it could not meet its current obligations, and other suits were threatening. Naturally, as it desired its creditors treated with equality, it adopted the plan of a receivership (rec. pp. 92, 151). By voluntarily adopting the receivership proceedings it exercised its right of ownership to dispose of its property as it wished as much as though it had made direct transfer to its creditors.

In principle our case is like that of *Ward vs. Manufacturing Co.*, 41 Atl. 1057, 1059, col. 2. There a majority of the company's stockholders brought a suit for its dissolution and had a receiver appointed. In the case at bar, although a creditor brings the suit and asks for a receivership the evidence shows that this was the course adopted by the company to obtain equality among its creditors, and was concurred in by the directors and stockholders and authorized and initiated by them just as much as the proceeding in the Ward case was. The method of procedure was formally different in the two cases, but in fact both were the voluntary acts of the company. In that case the court said that the proceeding was a voluntary one because its purpose was to carry out the vote of the directors through the agency of a receiver. Practically the same thing is true here. The receivership was adopted by the company as an agency for distributing its assets to its creditors. The court notes in that case, as evidence of its voluntary nature, that there was a stipulation for the immediate return of the writ and for a hearing on the day of its issue. So in this case, the answer of the company was filed the same day as the complaint and the receiver was immediately appointed, both parties attending for the purpose. The court says in that case that a decree which three-fourths of its shareholders had sought and none opposed cannot fairly be recognized as other than a voluntary one. In this case the evidence shows that the directors and all of the stock-

holders approved the appointment of the receiver and that none opposed it. The court held in that case that the receivership proceeding was an exercise by the company of the *jus disponendi* which is incident to ownership of property, and that the title vested was good everywhere. Disregarding the purely formal aspects of our matter and looking at the substance, it cannot be distinguished from the Ward case.

Turning now to the second ground above stated for holding the transfer to be voluntary, assume that the receivership proceeding was involuntary. It involved only the property of the company in Washington. It is not claimed that the company was obliged upon receivers being appointed to transfer the Alaska assets to them. The evidence shows there was no such statute or necessity. In fact the receivership had operated a considerable time before an assignment was made, and the positive, undisputed testimony is that the transfer was not made under or with reference to any Washington law or statute. (Dep. Kells, rec. p. 73 and dep. Smith, rec. p. 99.) It is true of course that after the transfer was made the same persons who were receivers in Washington and had control of the assets there, also by virtue of the transfer had control of the Alaska assets, but it was only subsequent to the voluntary assignment by the company of the Alaska assets and as a matter of convenience and economy, that the receivership had any control over those assets or over the company with respect to them.

The directors and stockholders of the company and the receivers independently of the court concluded that the transfer of the Alaska assets to the receivers should be made in order to secure an equal distribution of the assets among the creditors, and when the matter was fully planned and the company had agreed and was ready to make the transfer, although it was not at all necessary it was thought best to submit the plan to the Washington court and have its approval of the receivers undertaking the distribution of the assets in Alaska. The idea of a transfer originated with the company subsequent to the receivership suit as a means of preventing preferential and unfair action by Alaska creditors with reference to the Alaska assets. The company realized that the court in the receivership matter had jurisdiction only within the state of Washington over the assets there; that suits might be brought in Alaska, and the assets there attached, and thus great unfairness and inequality result; and it chose the receivers who already had legal control of the Washington assets as suitable trustees to whom to make a voluntary assignment of the Alaska assets, thus to secure a fair distribution of these too. Had it desired, the company might have assigned the Alaska assets to any other person for the same purpose. The evidence shows conclusively that the action on the company's part in making the transfer of October 26, 1914, was a free exercise of its right to dispose of its property as it saw fit. The following is quoted from the testimony:

"The instruments were executed in order to give the receivers legal title to the assets in Alaska and thus avoid the necessity of ancillary receivers being appointed there. The action was entirely voluntary on the company's part. * * * The officers, principal stockholders and creditors concurred in wishing to have the control of all the company's affairs in the hands of the company's receivers at Seattle, where its principal office had always been, and where its business interests were centered." (Dep. Kells, rec. pp. 68-69.)

"The purpose of the transfer was to make the handling of the properties as simple, cheap, and effective as possible for the protection of all the creditors alike. Yes, everybody desired this and approved of transferring the Alaska assets to the receivers. All the directors approved of this, and so far as my knowledge went all the stockholders did. I personally know that a large majority of the stockholders did." (Dep. Steberg, rec. p. 84.)

"Every trustee, and I believe every stockholder, certainly the vast majority of the stockholders, approved the execution of these instruments transferring the legal title of the Alaska assets to the receivers." (Dep. Smith, rec. p. 96.)

Also see the deposition of E. Schoenwald, record pages 153-154.

The only semblance of compulsion about the matter is that the order of the court approving the transaction in form directs the transfer. The same order, however, recites that the company's president was present representing it and consented to the

order, and the testimony shows that the whole matter was prearranged and agreed upon by the company, and the court only entered the order when assured of this. This is the testimony:

> "The court did not compel the transfer. It was fully planned, agreed upon and the instruments in process of preparation before any court order was obtained or the court acquainted with the plan. The purpose of the order was to have the approval of the court." (Dep. Kells, rec. p. 70.)
>
> "Naturally we wished the court's approval of the receivers' taking conveyance of the legal title of these assets, and also we desired the court to know that the company was favorable to the transfer of the assets. Therefore it was arranged that the receivers and my law assistant, acting for me, should go before the court the next day at Seattle, along with the president of the company, and the matter of a voluntary transfer be submitted to the court and approved by him. This was accordingly done. The court particularly assured himself that the company favored and desired to make such transfer, and thereupon he sanctioned the conveyance to the receivers." (Dep. Smith, rec. p. 95.)

> "There was no thought of compelling the company to execute the instruments of transfer. The court not only did not attempt to do this, but explicitly rested its order upon the acquiesence and consent of the company." (Same, rec. p. 96.)

> "The court asked particularly whether the company desired this, and Mr. Steberg told him it did. We also told him that the committee of the creditors, and everybody interested, so far as could be determined, was in favor of the

action as the natural, simple and economical thing to do. The court then approved the arrangement, and the deed and bill of sale which had already been drawn, were signed by the company through its president, and were delivered by Mr. Steberg to me." (Dep. E. Schoenwald, rec. p. 154.)

"The court simply approved the arrangement which had been made, after inquiring and being told, in my hearing, that the company as well as the creditor's committee and the receivers favored this." (Same, rec. p. 155.)

The fact that the court in the receivership matter might in the instant case after the assignment have more or less control over the Alaska assets through its receivers, is immaterial since it only obtained this authority by the voluntary act of the company in freely turning over the assets to the receivers. The case of *In re Farrel,* 176 Fed. (C. C. A. Sixth Cir.) 505, 510, 511, adequately covers this point. There it was contended that the statute of Ohio was an insolvent law because after an assignment was made for the benefit of creditors it regulated the trust, but the court quoted from *Mayer v. Hellman,* 91 U. S. 502, in answer to this, as follows:

"It does not compel or in terms even authorize assignments. It assumes that such instruments were conveyances previously known, and only prescribes a mode by which the trust created shall be inforced * * * The assignment in this case must, therefore, be regarded as though the statute of Ohio to which reference is made, had no existence. There is an

> insolvent law in that state; but the assignment in question was not made in pursuance of any of its provisions."

The court continues, saying that the statutes of Ohio presuppose the existence of a deed of assignment and creation of a trust, and simply undertake to regulate the trust later for the equal protection of the creditors; but "the right so to dispose of the property in trust is not dependent upon the statute. It is an ordinary attribute of ownership." (p. 511.)

So in the case at bar, the receivership proceeding did not compel or even authorize the assignment of the Alaska assets, and the assignment in this case should be regarded as though a receivership and the statutory law of Washington did not exist. The court in the receivership matter here might undertake to regulate the trust after it was created, but again to quote the words of the case just cited, "the right so to dispose of the property in trust is not dependent upon the statute (or upon the receivership proceeding), it is an ordinary attribute of ownership."

III.

The transfer being voluntary was binding in Alaska.

The district court assumed that we are asking for a decision in our favor upon the ground of comity (rec. p. 229 et seq.). Our claim, however, is based upon the ground that the assignment was

in accordance with the common law, which is the law of Alaska as well as of Washington, and the court in Alaska in enforcing the assignment is not recognizing the laws of Washington as a matter of comity, but is applying its own law applicable to such assignment. As said in *Stowe v. Belfast Savings Bank,* 92 Fed. (C. C. D. Me.) 90, 96: "It is not an exercise of comity to administer the local law though it agrees with the foreign law."

Our position is well stated by Judge Field (later Chief Justice), in *Train v. Kendall,* 137 Mass. 366, as follows:

> "In the absence of any statute making this assignment void or voidable by Massachusetts creditors, the common law prevails in actions at law, for it is the common law which the plaintiff invokes, and not any process, if there be any, for the equitable distribution of the assets of Kendall Brothers, found in Massachusetts. In so deciding, we do not give effect to a foreign law prejudicial to our own citizens; we give effect to an assignment which is good against the plaintiff in this action by our own law."

In the case of *Weider v. Maddox,* 60 Tex. 372, 377, the court criticizes expressions by various courts to the effect that voluntary assignments are recognized in other jurisdictions as a matter of comity, and in this connection says:

> "This seems to us to confer upon the courts a power too little restricted, too undefined and unlimited, to be tolerated in any country governed by laws. What, upon such a matter, is to

be deemed injurious to the rights of the citizens of the state in which the property is situated, should be the subject of legislative, and not Judicial discretion. Storey on Conf. of Laws, 390; *Guillander v. Howell,* 35 N. Y. 659.

"That the assignment was made in the state of Missouri is a matter of no importance, as its validity does not depend upon any local law of that state, but is based on the common law right of an insolvent debtor to make an assignment of all his property, subject to the payment of his debts, for the benefit of his creditors."

Since voluntary assignments are made under the common law, the rule almost universally accepted is that such assignments of personal property in one jurisdiction are good in every other as against attaching creditors, whether residents or non-residents, unless the transfers are contrary to the positive law or established public policy of the state where they are sought to be enforced. We shall later note two or three jurisdictions which have an exceptional rule.

In the case of *Stowe v. Belfast Savings Bank,* supra, one Dove, a resident of Massachusetts, assigned all of his property to one Ropes of the same state for the benefit of his creditors. The plaintiff is the successor of the assignee Ropes. The defendant bank, domiciled in Maine, afterwards attached there the real estate in question as the property of the original owner Ropes. The only question was whether an assignment in Massachusetts took precedence over the subsequent attachment

in Maine by a Maine creditor. The district court quoted Chief Justice Fuller in *Cole v. Cunningham,* 133 U. S. 107, 129, as follows:

> "In most states the distinction between involuntary transfers of property, such as work by operation of law, as foreign bankrupt and insolvency laws, and a voluntary conveyance is recognized. The reason for the distinction is that a voluntary transfer, if valid where made, ought generally to be valid everywhere, being the exercise of the personal right of the owner to dispose of his own, while an assignment by operation of law has no legal operation outside the state in which the law was passed." (p. 95.)

The court refused to follow the holding of the supreme court of Maine in the case of *Fox vs. Adams,* 5 Maine 245, and decided that the assignment in Massachusetts took precedence over the subsequent attachment in Maine by a resident creditor there. The case was appealed and affirmed by the C. C. C. A. 1st Circuit, 92 Fed. 100, the appellate court holding that a discrimination in favor of local creditors just because of their citizenship was in violation of section 2 of Article IV of the constitution, providing that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states," and considered that the supreme court of the United States had so decided in *Blake v. McClung,* 172 U. S. 239,; 43 L. Ed. 432.

In that case a statute of the state of Tennessee gave creditors resident in the state a priority over non-residents in the distribution of the assets of a

foreign corporation. This statute was held unconstitutional as in violation of sec. 2, Article IV, giving equal privileges and immunities to the citizens of the several states. See also *Blake v. McClung,* 176 U. S. 59; 44 Law Ed. 370, 374.

The same statute was under consideration, and the same conclusion reached in *Sully v. American National Bank,* 178 U. S. 289; 44 Law Ed. 1072, 1075-6; and a similar statute of the state of Michigan was considered and held unconstitutional in the case of *Maynard v. Granite Sate Provident Association,* 92 Fed. (C. C. A. Sixth Circuit) 435, 438. The provision of these statutes is exactly the same as the principle which the district court in this case considered to be the law, namely, that although the transfer were voluntary, yet Alaska creditors would be excepted from its operation although citizens of other states were not. The same discrimination in favor of citizens of a particular state provided for in these statutes, and which was condemned as unconstitutional by the supreme court, was considered by the lower court in this case to be legal. As authority for its conclusion it cited *Security Trust Co. v. Dodd, Mead & Co.,* 173 U. S. 624, 628, where the court stated that "such assignments (voluntary) will be respected, except so far as they come in conflict with the *rights of local creditors,* or with the laws or public policy of the state in which the assignment is sought to be enforced." Commenting on this, the court in the case at bar in his opinion says:

> "According to this the rights of local creditors are safe-guarded whether the assignment be a common law assignment or a statutory assignment." (Rec. p. 234.)

The decision here assumes that the supreme court decided in the Dodd case that a voluntary assignment would be respected as binding upon all creditors except those in the jurisdiction where it was sought to be enforced, and that the courts there would discriminate in favor of local creditors. We submit that the supreme court decided no such thing. If it did, it certainly later repudiated the decision when in the case of *Blake v. McClung,* supra, it decided that such discrimination was unconstitutional. Not one of the cases cited by the supreme court in the Dodd case in support of the principle announced admits of discrimination in favor of local creditors.

Among these cases cited is *Black v. Zacharie & Co.,* 3 How. 382; 11 L. Ed. 690. There Black in South Carolina assigned all his property for the benefit of creditors. Subsequently Zacharie & Co., residents of Louisiana, attached there certain stocks formerly owned by Black. In a contest between the assignee and the attaching creditors the supreme court, Justic Story writing the opinion, held that an assignment valid in South Carolina was binding everywhere, and although Louisiana is sometimes cited as a jurisdiction which makes a preference in favor of local creditors as against foreign assignees, the supreme court considered it as having

adopted the generally accepted rule. See 11 Law Ed. 704, col. 2.

Manifestly in the Dodd case the court meant by the expression "rights of local creditors," rights which they possess under the statutory or customary law of the state of their citizenship, and not rights secured merely by a discrimination in favor of local creditors just because they are citizens, and against all others just because they are not citizens.

The only jurisdictions apparently which seek to discriminate in favor of resident creditors, holding that a foreign voluntary assignment does not take preference over their subsequent attachments, are Maine and Illinois. See note 65 L. R. A. 355, col. 2 et seq. Massachusetts is also sometimes classed with these two states, but its decisions in *Means v. Hapgood,* 19 Pick. 105, and *Train v. Kendall,* 137 Mass. 366, are in accordance with the generally recognized rule.

The cases holding that a voluntary assignment in one state is good everywhere regardless of the citizenship of the attaching creditors are too numerous for citation. The following are some of these:

Carter Battle Grocery Co. v. Jackson, 45 S. W. (Tex.) 615;

Askew v. The LaCygne Exchange Bank, 83 Mo. 366, 369-371;

Van Wyck v. Read et al, 43 Fed. (C. C. N. D. Fla.) 716, 718;

Atherton v. Ives, 20 Fed. (C. C. Ky.) 894;

Law v. Mills, 18 Pa. St. 185;

Frazier v. Fredericks, 24 N. J. L. 162, 166, 167;

Johnson v. Sharp, 31 Ohio St. 617, 619;

Coflin v. Kelling, 83 Ky. 649, 656;

Union Savings Bank & Trust Co. v. Indianapolis Lounge Co., 47 N. E. (Ind.) 846, 847 col. 2, and cases there cited.

In the case of *Frazier v. Fredericks,* among those just cited, the court said, page 167:

> "A voluntary assignment, made by a debtor for the benefit of his creditor, would seem, upon principle, to stand upon the same ground, so far as the present inquiry is concerned, with any other transfer of personal property by the owner. If, then, a sale by the owner of property lying in a foreign state be effectual for the absolute transfer of the property to the vendee, an assignment of the same property for the benefit of creditors must be equally valid and effectual."

The court also approves the language of Chancellor Kent to the effect that the acts of parties, valid where made, should be recognized in other countries, provided they be not contrary to good morals nor repugnant to the policy and positive institutions of the state. (p. 166.)

Other cases holding foreign voluntary assignments good even as against resident creditors are:

Walters & Walker v. Whitlock, 9 Fla. 86; 76 Am. Dec. 607, 8-13;

Clark v. Connecticut Peat Co., 35 Conn. 303, 307-8;

Ockerman v. Cross, et al., 54 N. Y. 29, 32.

The general rule is also stated and approved in the cases of *Barth v. Backus,* 35 N. E. (N. Y.) 425, 426, and *Weider v. Maddox,* 66 Tex. 372, 376, 379.

In *Catlin v. Wilcox Silver Plate Co.,* 24 N. E. (Ind.) 250, 253, the assignment in Illionis was involuntary. An attachment was made by Connecticut creditors in Indiana. It was contended that since the attaching creditors were nonresidents the assignment, though involuntary, should be recognized as to them, although it would not be as to resident creditors of Indiana. The court said:

> "The rule which commends itself to our judgment is thus declared: 'Once properly in court and accepted as a suitor, neither the law nor court administering the law will admit any distinction between the citizens of its own state and that of another. Before the law and its tribunals there can be no preference of one over the other.' *Bank v. Lacombe,* 84 N. Y. 367. * * * This rule governs the more recent decisions."

In the case of *Segnitz v. Trust Co.,* 83 N. W. (Wis.) 327, 328, col. 1, the assignment was also held involuntary since the statute under which it was made contained bankruptcy features. However, the rule governing assignments is well stated as follows:

> "The general proposition may be stated that a voluntary common law assignment for the benefit of creditors good in the state where made carries title to personal property wherever situated. This court has so held and such holding is supported by the great weight of authority (numerous cases are cited). In Illinois, Louisiana and Maine and possibly some other states the rule is limited and will not be allowed to prevail as against creditors of the assignor residing in those states. (Cases from Illinois and Maine cited.) The general rule, however, is as above stated."

See also the following cases in which the rule is recognized, discussed and clearly stated:

Moore v. Land Title & Trust Co. 33 Atl. (Md.) 641;

Roberts v. Norcross, 45 Atl. (N. H.) 560, 561 col. 2;

Byers v. Tabb et al, 25 So. (Miss.) 492, 493 col. 2;

Since the assignment of the Alaska assets was a free exercise by the company of its right to dispose of its property, it should have been recognized in Alaska even though McDonald, the attaching creditor, was a citizen there. No one has at any time claimed that the assignment was contrary to any statutory or customary law of Alaska.

To sum up, the transfer of the Alaska assets was the act of the corporation by validation through acquiescence of all the stockholders, if not otherwise.

And moreover, the question of the regularity of its execution in the absence of fraud cannot be raised by a creditor. The lower court in its opinion is silent as to both these grounds.

Second, as a matter of fact and under the law also, the assignment here was the voluntary act of the company and was merely an exercise of the owner's right of disposition of all the property for the benefit of all the creditors alike. The only case presented in the lower court to sustain the court's decision that this transfer was involuntary was one clearly distinguishable in its facts; one in which all of the assets except those attached in the state of Kentucky had been turned over to a few individuals on the inside, stockholders and directors, by way of rank preference, leaving substantially nothing to all the rest of the creditors. Whereas here the plaintiffs are seeking to execute justice for all the creditors alike, whereas the defendant McDonald is seeking to prefer his individual claim at the expense of all the remaining creditors, wholly without just reason. We submit that every uncertainty or doubt should be resolved in favor of the plaintiffs in error in this case for this reason, if no other.

Third, the transfer being voluntary as contrasted with involuntary or statutory, the authorities all concur, federal and state, with the single exception of two or three state jurisdictions, that the assignment is good everywhere, and that therefore

the property in question was not subject to the attachment of McDonald.

For these reasons it is earnestly maintained that the judgment of the lower court should be reversed and set aside, and judgment ordered for the plaintiffs in error.

Respectfully submitted,

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